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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78 - 437

JOSEPH A. CALIFANO, Secretary of
Health, Education and Welfare,
Appellant,

v.

CINDY WESTCOTT, et al., Appellees

No. 78 - 689

ALEXANDER SHARP, II, Commissioner of
the Massachusetts Department of
Public Welfare, Appellant,

v.

CINDY WESTCOTT, et al., Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS ON BEHALF OF
APPELLEES

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November 14, 1978

IN THE
SUPREME COURT OF THE UNITED STATES
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FORMA PAUPERIS

Appellees Cindy and William Westcott and Susan and John
Westwood ask leave to file the attached Motion to Affirm without
prepayment of costs and to proceed in forma pauperis pursuant to
Rule 53.

The appellees' affidavits in support of this motion are
attached hereto.

Dated: November 14, 1978

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978
JOSEPH A. CALIFANO, Secretary of Health,
Education and Welfare, et al.,

Appellants

v.

CINDY and WILLIAM WESTCOTT, et al.,

Appellees

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA
PAUPERIS

We, Cindy and William Westcott, being first duly
sworn according to law, depose and say, in support of our application
for leave to proceed without being required to prepay costs
or fees:

1. We are appellees in the above-entitled cause.
2. We are unable to pay the costs of said cause because
of our family's poverty.
3. We are unable to give security for the same.
4. We believe we are entitled to the redress we seek
in said cause.

5. The nature of said cause is briefly stated as follows:

We are the parents of one child and, at the time the
above cause was filed in January, 1977, we were being
denied Aid to Families with Dependent Children (AFDC) which,
in pertinent part, provides benefits to families of needy
children in two-parent homes where the father is unemployed
(called AFDC-U), but is denied to similarly situated
needy children and their families where the mother is
unemployed. The United States District Court held that
this sex-based discrimination between families, established
by both federal and state law, violates equal protection

rights under both the Fifth and Fourteenth Amendments
to the United States Constitution. The discrimination
was found by the Court to deprive needy unemployed
mothers, their spouses, and their dependent children
of financial and medical assistance to meet the bare
necessities of life.

Cindy Westcott
Cindy Westcott

William R Westcott
William Westcott

Duly witnessed and sworn to before me, a Notary
Public, this 26 day of October, 1978.

[Signature]
Notary Public

My commission expires: 7/28/1984

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

RECEIVED

NOV 2 1978

CENTER ON SOCIAL
WELFARE POLICY & LAW
NEW YORK

JOSEPH A. CALIFANO, Secretary of Health,
Education and Welfare, et al.,

Appellants

v.

CINDY and WILLIAM WESTCOTT, et al.,

Appellees

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

We, Susan and John Westwood, being first duly sworn
according to law, depose and say, in support of our application
for leave to proceed without being required to prepay costs or fees:

1. We are appellees in the above-entitled cause.
2. We are unable to pay the costs of said cause because
of our family's poverty.
3. We are unable to give security for the same.
4. We believe we are entitled to the redress we seek
in said cause.
5. The nature of said cause is briefly stated as follows:
We are the parents of two children and, at the time
we entered the above cause in February, 1977, we were
being denied Medical Assistance (Medicaid) which, in
pertinent part, provides medical benefits to families
of needy children in two-parent homes where the father
is unemployed (called MA-AFDC-U related) but is denied

-2-

to similarly situated needy children and their families
where the mother is unemployed. The United States District
Court held that this sex-based discrimination between
families, established by both federal and state law,
violates equal protection rights under both the Fifth
and Fourteenth Amendments to the United States Constitution.
The discrimination was found by the Court to deprive needy
unemployed mothers, their spouses, and their dependent
children of financial and medical assistance to meet
the basic necessities of life.

Susan Westwood
Susan Westwood

John Westwood
John Westwood

Duly witnessed and sworn to before me, a Notary
Public, this 25th day of October, 1978.

Robert A. Corash

Notary Public

Robert A. Corash
Notary Public

My Commission Expires October 13, 1983

My Commission expires: _____

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ON APPEAL FROM THE UNITED STATES
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MOTION TO AFFIRM

Appellees Cindy and William Westcott, and Susan and John Westwood, and the class they represent move the Court to affirm the decision below on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

1. Whether Section §407 of the Social Security Act which creates the Aid to Families with Dependent Children - Unemployed Fathers (AFDC-U) program violates the Due Process Clause of the Fifth

Amendment by authorizing payment of welfare benefits to needy two-parent families with children deprived of parental support or care because of the father's unemployment, but not to similarly situated families deprived because of the mother's unemployment.

2. If yes, whether the appropriate remedy is simply to eliminate the gender discrimination in the AFDC-U program or simultaneously to restructure the program by adding a principal wage earner test and thereby terminate benefits to some currently eligible families.

STATEMENT OF THE CASE

Aid to Families with Dependent Children (AFDC) is a federal-state program authorized by the Social Security Act, §401 *et seq.*, 42 U.S.C. §601 *et seq.*, under which states with an approved AFDC state plan receive federal matching funds for aid that is paid with respect to a "dependent child." Section 403 of the Social Security Act, 42 U.S.C. §603. The Act defines "dependent child" as a needy child deprived of parental support or care by reason of the death, absence, or incapacity of a parent, Section 406(a) of the Social Security Act, 42 U.S.C. §606(a), or, as is pertinent here, by reason of the unemployment of his father, Section 407 of the Social Security Act, 42 U.S.C. §607.* Section 407 sets out specific conditions which the unemployed father must meet, and also authorizes the Secretary to set the standards for defining "unemployment," found at 45 C.F.R. §233.100.

States which elect to participate in the original AFDC program under §406(a) need not participate in the AFDC-U program established under §407. However, as with the program established under §406(a), states which do elect to participate must comply with the the requirements of the Act and federal regulations. Since a

* The Act also provides that AFDC payments include payments to meet the needs of the relative caring for the child, and in the case of children deprived of support because of the incapacity of a parent or the unemployment of a father, it includes payments to meet the needs of both parents. Section 406(b) of the Social Security Act, 42 U.S.C. §606(b).

dependent child is defined as one deprived of a father's unemployment, federal matching funds may not be provided for AFDC-U benefits to children deprived of parental support because of their mother's unemployment.

Families who receive AFDC-U benefits (or, at state option, who are eligible but who have not applied for cash assistance, 45 C.F.R. §248.1(a)(1)) are also entitled to medical assistance benefits under the federal-state Medicaid program, Section 1902(a)(10) of the Social Security Act, 42 U.S.C. §1396a(a)(10). The Social Security Act does not permit federal matching funds to be paid towards Medicaid benefits for needy children deprived of support or "care by reason of the unemployment of their mother, however.

Massachusetts has exercised its option under §407 to make AFDC-U payments and provide Medicaid coverage to families with children deprived of parental support because of the father's unemployment and receives 50% of the cost of its AFDC-U and Medicaid payments from the federal government.* Because federal funds are not available, the state does not provide AFDC-U or Medicaid benefits to families with children deprived of support because of their mother's unemployment.

This suit was filed after appellees were denied desperately needed AFDC-U and/or Medicaid benefits simply because the mother in each family rather than the father was the parent who was unemployed within the meaning of §407 and implementing regulations. The facts in the appellees' cases are as follows:

Cindy and William Westcott are married and reside with their infant son in Massachusetts. Cindy Westcott, age 19 when this suit was filed in January 1977, had been the family breadwinner

* See 6 CHSR III, Subch. A, Pt. 301, §301.03; pt. 303, subpt. A, §303.01, §303.04. The state has also opted to provide Medicaid to families who are eligible for AFDC but who have not applied for benefits. Mass. Public Assistance Policy Manual, Ch. I, Section F, Subd. 2a.

since her 1976 marriage to William Westcott. Her work history dating back to 1972 includes a variety of full-time and part-time jobs, in such positions as waitress and store clerk. Her most recent employment as a chambermaid ended in November 1976. William Westcott, age 19 when this suit was filed, has an 8th grade education. By the end of 1976, his minimal work history included only temporary odd jobs as unloading trucks, chopping trees, and a summer CETA job.

In November 1976 when they were without income the Westcotts applied for public assistance from the Massachusetts Department of Public Welfare but were denied AFDC-U for themselves and their unborn child because William Westcott did not have enough quarters of work to qualify as an unemployed father under the federal-state AFDC-U criteria. Cindy Westcott's status as an unemployed mother was irrelevant to the state's determination of their eligibility for AFDC-U.

Susan and John Westwood are married and presently reside in Massachusetts with their two children. Susan Westwood has worked part-time as a bookkeeper since 1972. When the Westwoods joined as plaintiffs in this suit, Susan Westwood was the family breadwinner. She was working 10-15 hours a week and had a weekly "take home" pay of \$66. John Westwood was unemployed and his only work history since 1972 was maple sugaring for two months in 1973 and maple sugaring and logging for nine months in 1974. In February 1977 the Westwoods applied for Medicaid because they wanted Medicaid coverage for medical care in connection with the birth of a second child. Although financially eligible for AFDC-U, they decided to forego those benefits. They were denied because John Westwood did not have enough quarters of work to qualify as an unemployed father.

Appellees brought this action on behalf of themselves and the class of Massachusetts families who would otherwise be eligible for AFDC-U and Medicaid but for the gender discrimination in the federal statute and Massachusetts regulations. Appellees' complaint

alleged that the gender discrimination in the federal statute and state regulations violated the Due Process clause of the Fifth Amendment and the Equal Protection clause of the Fourteenth Amendment respectively and further that the gender discrimination in the state regulations violated the state constitution. After this suit began the plaintiffs' attorneys and attorney for the state appellant entered into stipulations whereby the Westcotts' eligibility for AFDC-U and the Westwoods' eligibility for Medicaid would be determined without respect to the requirement that the unemployed parent be male. Based on Cindy Westcott's and Susan Westwood's work histories, the Westcotts and Westwoods were found eligible and were provided benefits based on their continued eligibility pending resolution of their case.

On April 20, 1978 the District Court certified the class* and held that the gender discrimination in the federal statute and state regulations violates the Fifth and Fourteenth Amendments because it is not rational in light of the program's objectives and because it is based on the archaic and overbroad generalization that women are not breadwinners. The District Court agreed with all parties that extension of benefits to the class is the appropriate remedy.** Accordingly, it ordered the state to provide benefits to the class and appellant Califano to approve a plan to pay benefits to such families and federal matching funds for such benefits.

Massachusetts subsequently requested and on May 31, 1978 was granted a stay of the court's order to afford it time to implement a compliance plan. In its May 31st order at appellees' urging the Court rejected the state's suggestion that the order permitted the

* The state had merely objected to class certification without specifying any particular grounds. Thus there was no objection, for example, that the class as defined by plaintiffs was too broad.

** In its argument supporting extension, the state did not suggest that the AFDC-U program should be restructured to include a principal wage earner limit.

state to provide AFDC-U and/or Medicaid only to families deprived because of the unemployment of the "principal wage earner." The state then moved the Court to clarify or amend its April 20, 1978 order to permit the state to redesign its AFDC-U program to incorporate a principal wage earner test. On August 9, 1978 after extensive briefing by the state and appellees, the District Court denied the state's motion, stating that it is up to Congress to restructure the AFDC-U program beyond the Court's remedy in this case and that states can not limit the federal standards of eligibility for AFDC.*

ARGUMENT

I. SECTION 407 OF THE SOCIAL SECURITY ACT VIOLATES THE FIFTH AMENDMENT BECAUSE IT RESULTS IN THE DENIAL OF AFDC-U AND MEDICAID BENEFITS TO FAMILIES WITH CHILDREN DEPRIVED OF PARENTAL SUPPORT BECAUSE OF THE UNEMPLOYMENT OF THEIR MOTHER, SOLELY ON THE BASIS OF GENDER.

Summary affirmance is appropriate in this case since it does not present any novel questions of gender discrimination, the issue has presented no difficulty to the district courts which have considered it, and the three states affected have acquiesced in the decisions.** Thus, the District Court below held §407 of the Social Security Act unconstitutional because its gender discrimination is irrational in light of the important and explicit Congressional purposes behind the AFDC-U program and is based on the "archaic and overbroad generalization" that women are not breadwinners. The District Court's decision squarely follows recent decisions of this

* The state had been granted a further stay until October 1, 1978 and then until its application to this Court for a stay pending appeal is resolved, of so much of the April 20th order affects families with unemployed mothers and fathers employed 100 hours or more a month. On October 19, 1978 HEW served its motion to the District Court for a stay of the April 20, 1978 order pending appeal.

** Stevens v. Califano, 448 F. Supp. 1313 (N.D. Ohio 1978) appeal docketed Califano v. Stevens, No. 78-449 (U.S. Supreme Court) and Browne v. Califano, Civ. Action No. 77-1249 (E.D. Pa. June 9, 1978) appeal docketed Califano v. Browne, No. 78-603 (U.S. Supreme Court). Although the district courts also held the implementing state AFDC-U regulations unconstitutional and in all three cases the states have been ordered to provide benefits at partial state

Court involving gender discrimination.

Appellant Califano presents two arguments in favor of plenary review. First, he contends that the decision below is in error because the gender discrimination in §407 does not harm individuals on the basis of gender. Second, he argues that the gender classification is rational in light of the legislative purposes of the program and is not based on an archaic stereotype of the role of women in society.*

Turning to the first argument, the fact that there is gender discrimination is self-evident. Under §407 of the Act AFDC-U benefits are available to families with needy children in two parent homes who are deprived of parental support or care because the father meets the federal definition of unemployed,** but similarly situated families with mothers who meet the federal definition of unemployed are denied aid. The only difference between the appellees' class and families who are provided aid under §407 is the gender of the parent who satisfies the federal definition.

HEW, however, attempts to suggest that this classification, admittedly based on gender,*** works no bias since the two-parent families with unemployed fathers provided aid under §407, and those with unemployed mothers denied aid inevitably contain both males and females, and that this Court's decision on gender

Footnote from previous page -

expense, none of the three states, including Massachusetts, has appealed the decision that the sex discrimination is unconstitutional.

* HEW suggests that the cost of the District Court's decision is a reason for plenary review. While the decision would mean additional expenditures, appellees question of the accuracy of HEW's cost estimates. Appellant Califano's Jurisdictional Statement (J.S.) at 7, n. 6. These estimates, presented for the first time, are not supported by any facts in the record. Moreover, cost alone is not a basis for plenary review, when the merits are as clear as they are in this case.

** The federal standard requires that the father be totally unemployed or employed less than 100 hours per month, 45 C.F.R. §233.100(a)(1)(i); (c)(1)(iii), and that he have six or more quarters of work in which he received earnings of not less than \$50 in any 13 calendar quarter period ending within one year prior to application for AFDC, or have received or qualified for unemployment compensation within such one year period. 42 U.S.C. §607(b)(1)(C). Also, the father must not have been employed for 30 days prior to the receipt of AFDC or have refused a bona fide job offer without good cause within such 30 day period, §607(b)(1)(A), (B).

*** See, Appellant Califano's J.S. at 7.

discrimination are therefore inapplicable. The Secretary cites Califano v. Goldfarb, 430 U.S. 199 (1977) in support, suggesting that while it is often difficult to determine whether a classification discriminates against women, there is no "loser" on the basis of sex in this case. (Appellant Califano's J.S. at 8, n. 8).

This argument is simply frivolous. Section 407 discriminates against mothers in two-parent homes such as Cindy Westcott and Susan Westwood by denying them and their families currently needed welfare benefits based upon their past employment which would have been provided if they had been male. The different views in the Goldfarb opinions as to whether the discrimination should be analyzed from the view of the prospective beneficiary (the widower) or the deceased wage earner (the female wage earner) were related to the Justices' opinions as to whether the classification favored surviving widows or penalized deceased female wage earners. In this case, there is no conceivable way in which the gender classification can be viewed as favoring women. Section 407 makes Cindy Westcott and Susan Westwood and their families "losers" simply because the unemployed parent in each family is female.

The classification in this case is therefore similar to that in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) and is likewise discriminatory. In that case, the discrimination against the deceased wage earner mother deprived her surviving children, male and female, of the personal care and attention of the surviving parent by denying the widower the Social Security survivor's benefits which would have enabled him to remain at home to care for the children at a higher standard than would have been provided to him under the subsistence level AFDC and Medicaid program. Id. at 651. In this case the effect of the discrimination against unemployed mothers is even more devastating to the entire family, which is definition in dire financial need, since it results in the denial of subsistence level AFDC and/or Medicaid benefits.

The Court's analysis in Wiesenfeld therefore applies with full force to this case.* The Court recognized that the Social Security provision granting survivor's benefits to widows but not widowers penalized women wage earners by affording them less protection for their families than was afforded to male workers. Underlying the classification was an

"'archaic and overbroad' generalization ... 'not ... tolerated under the Constitution' ... namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." Id. at 643. See also p. 644 and n. 13.

The Court engaged in a careful review of the legislative history. It determined that the clear legislative purpose was to enable the surviving parent to remain home to care for the children and concluded that the gender classification was irrational in light of that purpose. See also Id. at 655 (Rehnquist, J. concurring).

This brings us to HEW's second argument, that the gender classification in §407 is not premised on the constitutionally invalid assumption that women in two-parent families are not breadwinners, and is not irrational in light of the clear legislative purpose. We therefore turn to a review of the legislative history of the AFDC program to discern its purposes and the basis for the gender discrimination.

The overarching Congressional purpose in designing the AFDC program, we submit, was to provide aid to families with children deprived of a breadwinner's support. We must address this point in some detail since HEW's Jurisdictional Statement does not

* HEW suggests that unlike the situation in Wiesenfeld, §407 does not denigrate the efforts of women workers, since it is not a program of unemployment compensation or one based on contributions or taxes of either parent. Appellant Califano's J.S. at 16. This is a distinction without a difference. The AFDC program is a need-based government benefit program which in this case is providing benefits on the basis of a prior work history. Entitlement is a matter of statutory right and the government may not unconstitutionally discriminate against classes of individuals in awarding benefits. See Shapiro v. Thompson, 394 U.S. 618 (1969).

acknowledge this central purpose despite the District Court's extensive treatment of this matter. We submit that HEW has chosen to avoid the paramount purpose of the AFDC program because it cannot show how the gender discrimination in §407 is constitutionally permissible in light of this pervasive legislative purpose.

As the Court recognized in King v. Smith, 392 U.S. 309, 327-330 (1960), the AFDC program, originally proposed by President Roosevelt in 1935 to counter the effects of the Depression, was intended to assist needy children who would not be helped by the Administration's work projects because no breadwinner was in the home.* Congress defined the needy children deprived of a breadwinner's support who would be eligible to receive benefits as children "deprived of parental support or care" because of the death, absence, or incapacity of a parent. Section 406(a) of the Social Security Act, 42 U.S.C. §606(a), 49 Stat. 629. Although during its consideration of the legislation Congress referred to the breadwinner as the father, undoubtedly a reflection of social patterns,** the statute it enacted was sex neutral and provided aid if a child were deprived because of the absence, death or incapacity of either the mother or father. From the outset therefore, AFDC was available to two-parent families in which the family was deprived because of the mother's incapacity, and also to families in which the father was the only parent in the home.

In 1961 Congress once again dealt with the deprivation caused children during a recession and extended AFDC, at the state's option, to reach children in two-parent families deprived of parental support or care because of the unemployment of a parent. Pub. L. No. 87-31, 75 Stat. 75.*** Congress thereby recognized

* Massachusetts agrees that the purpose of the AFDC-U program was to aid families deprived of a breadwinner's support. Appellant Sharp's Jurisdictional Statement (J.S.) at 4-5, 12.

** King v. Smith, supra, at 328; H. Rept. No. 615, 74th Cong., 1st Sess. (1935) at 10.

*** The AFDC-U program was initially authorized from May 1961 through June 1962. It was then renewed for 5 years and made permanent in 1967. 81 Stat. 821 (approved Jan. 2, 1968).

that children in "needy families in which the breadwinner is unemployed ..." were just as deprived of parental "support" by the unemployment of a breadwinner parent as they would be if the parent were absent, dead, or incapacitated.* The overriding purpose of the AFDC program continued to be the provision of aid to needy families deprived of parental support or care.

It was only in 1967 when Congress decided to make the AFDC-U program permanent that it made its first and only break with its 32 year history of providing aid on a gender neutral basis to children deprived of the support of either parent by denying AFDC-U benefits to children deprived because of the mother's unemployment. HEW claims that this novel gender limitation was the product of an actual, considered legislative choice (Appellant Califano's J.S. at 16-17), but this is not borne out by the record. The only explanation for the gender bias is the sparse statement in both Committee Reports:

"This program was originally conceived as one to provide aid for children of unemployed fathers. However, some States make families in which the father is working but the mother is unemployed eligible. The bill would not allow such situations. Under the bill the program could apply only to the children of unemployed fathers." S. Rept. No. 744, 90th Cong., 1st Sess. (1967) at 160. See also H. Rept. No. 544, 90th Cong., 1st Sess. (1967) at 108.

Given the plain language of the word "parent" in both §406 and §407, and the consistent history of providing AFDC under §407 to children deprived of support of either parent,** the statement that Congress meant "father" when it said "parent" in 1961 has absolutely no basis. There is also no indication whatsoever in this statement or elsewhere that Congress was abandoning the AFDC program's basic purpose of aiding families with children deprived

* See, e.g., S. Rept. No. 165, 87th Cong. 1st Sess (1961) at 2-3; 107 Cong. Rec. 3763 (March 10, 1961); and citations in the District Court's opinion, Appellant Califano's J.S. at 24a. Although Congress' references to the unemployed breadwinner as the father no doubt reflected social patterns, see, e.g. District Court opinion, J.S. at 24a-25a, n. 15, the original AFDC-U statute was sex neutral.

** HEW regulations prior to 1968 reflected the clear recognition that the child could be deprived because of the unemployment of either parent. Handbook of Public Assistance Administration, Part IV, §3424.21 (8/5/63).

of a breadwinner-parent's support. The only fair implication of the statement is that Congress - even in 1967 - was the victim of the stereotype that it was only the father's unemployment that deprived the children of significant support and that needed to be protected against. Of course, such an assumption is indistinguishable from the constitutionally impermissible archaic and overbroad generalizations that women are dependent on their husbands and that they are child-rearers and homemakers rather than family breadwinners. Califano v. Goldfarb, supra, 430 U.S. at 206-07, 217, 222-23 (plurality opinion and opinion of Stevens, concurring); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, supra; Frontiero v. Richardson, 411 U.S. 677 (1973).*

Appellant Califano's sole attempt to justify the gender discrimination in §407 relies on the argument that Congress made a conscious decision in 1967 to seek a solution only for the narrow problem of deserting fathers and not for the problem of children deprived of parental support because of unemployment of a parent. Appellant Califano's J.S. at 12. It is certainly true, as the District Court recognized, that a complementary purpose of the AFDC-U program was to discourage desertions and promote family stability. As we shall demonstrate, however, the gender discrimination is irrational in light of that purpose.

In 1961 and 1962, when Congress debated extending AFDC to families with children deprived because of a breadwinner's unemployment, it was clearly reacting not only to the financial needs of such families but also to a perceived structural incentive in §406 for parental desertion. Congress believed, as the Secretary argues, that the unemployed breadwinner in destitute families was encouraged to abandon the family so that the remaining parent and

* In its opinion, the District Court noted the substantial role that women play in the work force. See Appellant Califano's J.S. at 14a-15a n. 8 and 31a, n. 23.

children could qualify for AFDC under §406. In considering this matter, Congress spoke of an incentive for unemployed fathers to desert.* Congress addressed this problem by extending AFDC to two-parent families deprived of the unemployment of a parent. When the AFDC-U program was made permanent in 1968, Congress reiterated the family stability goal as a reason behind the permanent extension of AFDC. See, e.g., S. Rept. No. 744, 90th Cong. 1st Sess. (1967) at 160.

Appellant Califano's claims that the gender classification added to §407 in 1968 is justified because Congress was attempting to cure the specific, factually demonstrated problem of deserting unemployed fathers cannot save the statute, because it is totally unrelated to that legislative purpose.** In the first place, the gender classification actually undermines the legislative purpose. Families such as the Westcotts and Westwoods, who are deprived of desperately needed AFDC and/or Medicaid benefits because it is the mother who is unemployed, face the dilemma of remaining together and foregoing benefits or separating so that the remaining parent and children can qualify. As the District Court noted, after the Westcotts were denied AFDC-U benefits their landlord, impatient for his delinquent rent, suggested that William Westcott leave the home so that Cindy and her unborn child would be eligible for AFDC. (Appellant Califano's J.S. at 27 n. 16).

* The figures did show that most of the families receiving AFDC under §406 qualified because of the father's absence.

** Even though the legislative history from 1961 on contains references to the problem of deserting fathers, this most likely results from the fact that in two-parent homes women were more likely to be childrearers and homemakers, and thus perhaps less likely to desert their children. However, decisions of this Court have clearly rejected gender-based statutory classifications premised on notions about the family and work roles of men and women as inappropriate means of achieving statutory objectives, even when those notions have empirical support. Weinberger v. Wiesenfeld, supra, 420 U.S. at 644-45; Frontiero v. Richardson, supra; Craig v. Boren, 429 U.S. 190, 202 n. 13 (1976).

Secondly, although HEW cites references from the 1961-62 legislative history concerning the problem of deserting fathers, §407 was sex neutral until 1968. Thus, prior to 1968 Congress apparently did not consider that the goal of reducing the desertion incentive and promoting family stability should be addressed by a gender-based solution. Moreover, there is no indication that the 1968 change from "parent" to "father" was related to the problem of deserting fathers.* Indeed, the statement from the 1968 Committee Reports quoted above which purports to explain the reason for the change does not in any way link the change to the desertion problem. Thus, while there is no doubt that from 1961 on a purpose of the AFDC-U program as a whole was to remove the desertion incentive, there is no evidence whatsoever that the 1968 amendment restricting §407 to families of unemployed fathers was itself tailored specifically to address that problem.

Thus, Congress acted unconstitutionally in 1968 when it restricted §407 to families with unemployed fathers. The denial of aid to families with unemployed mothers is totally unrelated to the goal of promoting family stability by discouraging desertion and even undermines that goal. Moreover, there is obviously a gender neutral way to address the problem and foster the goals of the program, namely that used by Congress between 1961 and 1968 when aid was provided to families deprived because of a parent's unemployment.

The gender classification in §407 therefore cannot be justified and indeed is irrational in light of the explicit statutory purposes of aiding families deprived of a breadwinner's support and promoting family stability. HEW has not offered any other possible justification for the classification. While HEW asserts

* It is interesting that the bill proposed in 1967 by the Administration, H.R. 5710 (90th Cong., 1st Sess.), would simply have made §407 permanent and would not have changed the language of the existing statute. Thus in 1967 the Administration apparently did not consider a gender based statute necessary to promote the anti-desertion aims of the AFDC-U program.

that the gender discrimination in §407 can survive scrutiny under any of the standards articulated by this Court in recent gender discrimination cases, appellees contend that, to the contrary, affirmance of the District Court decision is warranted under this Court's recent gender discrimination decisions. This case involves no new questions about the application of constitutional principles to gender discrimination claims and thus does not warrant plenary review.

In sum, the gender classification in §407 penalizes poor women by absolutely denying them and their families desperately needed AFDC-U and/or Medicaid benefits simply because the mother rather than the father is the unemployed parent. Section 407 is but another example of the discrimination that has long victimized women in our society. Frontiero v. Richardson, *supra*, 411 U.S. at 684; Cf. Califano v. Goldfarb, *supra*, 430 U.S. at 218 (Stevens, J. concurring) and 226 (Rehnquist, J. dissenting).*

The gender discrimination is based on a constitutionally impermissible archaic and overbroad generalization that women are not breadwinners, Weinberger v. Wiesenfeld, *supra*, and as the legislative history demonstrates is plainly not the product of an actual, considered legislative choice but merely the product of stereotyped thinking about the role of women. Califano v. Goldfarb, *supra*, 430 U.S. at 199 (Stevens, J. concurring). The classification is completely irrational in light of the explicit and important Congressional purposes of providing aid to families deprived of a breadwinner's support and promoting family stability by discouraging desertion. Weinberger v. Wiesenfeld, *supra*, 420 U.S. at 651 (majority opinion), 734 (Rehnquist, J. concurring).** The

* There is no way in which this classification can be viewed as favoring women or compensating them for past discrimination, nor has HEW asserted such a purpose. Therefore, the classification cannot be saved on this ground. See, Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, *supra*, 430 U.S. at 242 (Rehnquist, J. dissenting); Kahn v. Shevin, 416 U.S. 351 (1974).

** There is no possible way that absolute denial of benefits to families with an unemployed mother could be justified by an administrative convenience rationale, since the AFDC program requires individualized proof both that the child is deprived of parental

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classification certainly bears no "fair and substantial relation to the object of the legislation" Reed v. Reed, 404 U.S. 71, 75 (1971) quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Further, the classification neither serves the important government objectives revealed in the legislative history, nor is it substantially related to the achievement of those objectives. Califano v. Webster, *supra*, 430 U.S. at 316-17 quoting Craig v. Boren, *supra*, 429 U.S. at 197. Instead, as discussed above, the gender classification undermines those important statutory objectives.

For the above reasons, the April 20, 1978 order of the District Court holding §407 unconstitutional should be affirmed.

II. THE APPROPRIATE REMEDY IN THIS CASE IS SIMPLE ELIMINATION OF THE GENDER DISCRIMINATION IN THE AFDC-U PROGRAM, NOT SIMULTANEOUS RESTRUCTURING OF THE PROGRAM TO ADD A PRINCIPAL WAGE EARNER TEST AND TERMINATE CURRENTLY ELIGIBLE FAMILIES

The District Court carefully considered and agreed with the arguments of all parties that extension of AFDC-U rather than invalidation of the entire AFDC-U program was appropriate under the standards articulated by Mr. Justice Harlan in Welsh v. United States, 398 U.S. 333, 361-66 (1970) (concurring). The District Court appropriately decided to do the minimum necessary to repair the constitutional defect and extended benefits to class members under the same conditions that now apply to families with unemployed fathers. Since needy families are currently eligible under §407 if the father satisfies the federal definition of unemployed, the District Court entered partial summary judgment on April 20, 1978 ordering that aid also be provided to needy families if the mother satisfies

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support for one of the reasons specified in §§406(a) or 407 and that the family is financially needy. Appellees simply seek the same opportunity to make these showings and receive benefits that families with unemployed fathers are given under §407. Cf. Califano v. Goldfarb, *supra*, 430 U.S. at 230, 238 (Rehnquist, J. dissenting).

the federal definition of unemployed. In effect, the District Court's April 20, 1978 order enabled needy families to qualify for AFDC-U based on the unemployment of a parent, just as they had between 1961 and 1968.

Massachusetts subsequently abandoned its argument in favor of simple extension, and claimed that the District Court should restructure the AFDC-U program by limiting eligibility to needy families in which the parent who is the principal wage earner meets the federal definition of unemployed. This would have meant, of course, that needy families currently receiving benefits based on the father's unemployment would be terminated unless the father could show that he was also the principal wage earner. The District Court rejected these claims, stating that further modifications to §407 should be left to Congress.

The District Court's rejection of a principal wage earner test is so manifestly correct that plenary review by this Court is not warranted. HEW has not supported the state's attempts to restructure the program to deny aid to currently eligible families by imposing a principal wage earner restriction, nor has it appealed the District Court's remedy in this case.* Neither Ohio nor Pennsylvania, the state defendants in the other §407 sex discrimination suits now pending before this Court, Califano v. Stevens, supra, and Califano v. Browne, supra, has sought to impose a principal wage earner test.

* While HEW has not appealed the District Court's remedy, HEW suggests that it is free to define "unemployment" in any gender neutral way. Appellant Califano's J.S. at 6 n.5. Although this statement is vague, appellees dispute that HEW has the authority to define "unemployment" to include a primary wage earner test. Of course, even if HEW had such authority, it has not adopted such a regulation. Accordingly, Massachusetts is not free to impose such a test. HEW has also indicated to the District Court that it is considering whether to propose legislation to impose a principal wage earner test. Affidavit of Gilbert Fisher (Director of the Division of General Policy, Office of Policy and Regulations of the Social Security Administration, HEW), submitted to the District Court in support of HEW's October 19, 1978 motion for a stay of the District Court's April 20, 1978 order pending appeal. It is appellees' position that a principal wage earner test can be imposed only by legislation.

In determining whether a principal wage earner test is permissible the starting point is the plain meaning of the statute. Caminetti v. United States, 242 U.S. 470 (1917). Section 407(a) as is relevant here, defines a dependent child as one

"... deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father ..."

On the face of the statute, therefore, a needy family is eligible if the father meets the federal standards for unemployed even if the mother is the principal wage earner. Indeed, the HEW regulations implementing §407, first adopted in 1969 and amended several times thereafter, have never required or permitted a principal wage earner test. 45 C.F.R. §233.100. See also 45 C.F.R. §233.90(a). This contemporaneous and consistent interpretation of the Act by the agency charged with administering the AFDC program is entitled to deference. New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 421 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). During the course of this litigation, the HEW Regional Office advised the state of its view that neither the statute nor federal regulations sanctions a principal wage earner limit.*

Thus, it is apparent that the language of statute bars a principal wage earner test. While the statutory language itself provides an adequate basis for rejecting the state's claim, the state has argued that the legislative history demonstrates that Congress intended to impose a principal wage earner test when it amended §407 in 1968. The legislative history plainly does not evidence such an intent, but only that Congress paid virtually no

*July 11, 1978 letter from Charles C. Gentile, Acting Asst. Reg'l. Cmmr. for Family Assistance to Stephen Kane, Asst. Cmmr. for Asst. Payments, Massachusetts Dept. of Public Welfare. Appendix A. This letter was a response to the state's submission of a proposed AFDC state plan amendment to apply a principal wage earner test. In its Jurisdictional Statement the state noted that HEW remained silent on the principal wage earner issue in the District Court (Appellant Sharp's J.S. at 8). This is technically correct in that HEW never made a formal submission to the Court. Nonetheless, plaintiffs did bring the HEW letter to the Court's attention.

attention the change from "parent" to "father".* What legislative explanation there is only indicates that the change was not fully thought out and was most likely the product of stereotyped views about the roles of fathers and mothers in two-parent families.** Since the legislative history is confusing and ambiguous on the principal wage earner point, the Court must rely primarily on the plain language of the statute. N.L.R.B. v. Plasterers' Local U. No. 79, 404 U.S. 116, 127-29 (1971); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 (1971).

Thus, as discussed in Point I above, the only explanation in the legislative history for the introduction of gender discrimination to §407 is the cryptic statement in both Committee Reports that the amendment would prevent states from providing aid to families with a working father and an unemployed mother. While the statement indicates Congress' apparent disapproval of some states' eligibility criteria under the existing program, it alone simply cannot support the argument that Congress intended a principal wage earner restriction. Thus, Congress appears to have been reacting to the perceived problem that some states were providing AFDC-U benefits to families who were not actually deprived of a breadwinner parent's support. Congress apparently further assumed that mothers in two-parent families were simply not wage earners and that a claim for benefits on account of their "unemployment" was therefore per se suspect. Accordingly, Congress prohibited families from qualifying for AFDC-U based on the mother's unemployment.

Massachusetts has not cited any evidence that Congress actually considered the situation of two-parent families with two wage earners, one of whom becomes unemployed thus rendering the family needy, and decided not to provide aid to such families.

* The other proposed changes in the AFDC-U program, for example establishing a federal definition of unemployed, and a prior work history test, received much more attention.

** For example, during Senate hearings on the bill, H.R. 12080 (90th Cong. 1st Sess.) even prominent HEW witnesses and members of Congress did not focus on the gender discrimination that had been added to §407 by the House. Both Wilbur Cohen, Undersecretary of HEW and Senator Robert F. Kennedy erroneously and consistently referred to the program in the House-passed bill as one for dependent children of unemployed parents. Hearings of the Senate Finance Committee on H.R. 12080, 90th Cong., 1st Sess. (1967) at 268-69, 781.

Indeed, had Congress actually considered this issue and decided to adopt a principal wage earner test, it certainly would have known how to use precise language. The term "father" certainly does not accomplish this result and strongly argues that Congress did not intend such a test.*

In the absence of any definitive legislative history supporting its position, Massachusetts is left with the argument that the frequent use of the term "breadwinner" by Congress in its discussion of AFDC legislation (although never in the Act itself) since 1935 supports a principal wage earner test. See Point I, supra. But Congress used the term indiscriminately during its consideration of the AFDC-U legislation in 1961 and 1962 when it provided aid to children deprived because of the unemployment of a parent, and in 1967 when it limited AFDC-U to families deprived because of the father's unemployment even if the father were not the principal wage earner. The general use of this term throughout the history of the AFDC program cannot support an argument that Congress intended a principal wage earner test when it amended §407 in 1968.

In sum, the plain language of §407 and its longstanding interpretation by HEW bar a primary wage earner test.** The sparse and ambiguous legislative history does not provide a basis for ignoring the statutory language and thus cannot justify such a

* The state also relies on Stevens v. Califano, supra, to support its legislative history argument. That Court did apparently interpret the obscure Committee Report language as an attempt to disqualify families if one parent were fully employed. However, the Court recognized that this alleged purpose was not accomplished and that it was up to Congress, not the Court, to change §407 in that regard. Thus, Stevens ultimately offers no support to the state's argument.

**Even if §407 were determined to permit a principal wage earner test, an existing Massachusetts state would bar the state from implementing such a limit. Thus, M.G.L.A. Ch. 118, §1 (West 1969) defines a dependent child for AFDC to include a child "deprived of parental support or care by reason of the unemployment of a parent. This statute was adopted prior to the 1968 amendments to §407, and when §407 no longer authorized AFDC matching funds for children with unemployed mothers, state regulations were required by another state statute to limit AFDC-U to children of unemployed fathers. Whitfield v. Minter, 368 F. Supp. 798, 803 n. 10 (D. Mass. 1973). See also the District Court's opinion in Appellant

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radical restructuring of the AFDC-U program as a principal wage earner test would constitute.*

The state further argues that the result of the April 20, 1978 order, which in effect restores the AFDC-U program to the gender neutral structure that existed between 1961 and 1968,** is out of harmony with the structure of the AFDC program and eliminates the requirement of unemployment. This is plainly wrong.

First, the District Court's remedy is completely consistent with the structure of AFDC, which since 1935 has provided aid to needy families deprived of parental support because of the absence, death, or incapacity of either parent. See 42 U.S.C. §606(a). While the nature of the requirement that a child be deprived of parental support for specified reasons is such that generally one-parent families qualify, two-parent families have always been eligible for aid if the reason for deprivation is the incapacity of one parent. There is no restriction as to which parent's incapacity can qualify the family under §407(a). The extension of benefits to needy families deprived of support because of the unemployment of either parent under the order of the Court below would operate in a similar fashion and therefore is fully consistent with the

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Califano's J.S. at 7a-8a. If it were determined that §407 permitted a principal wage earner test at state option, the state statute would bar Massachusetts from taking advantage of this option.

* It therefore follows, under well-established precedents of this Court, beginning with King v. Smith, supra, and continuing through the recent decision in Quern v. Mandley, 98 S. Ct. 2068 (1978) that the state is not free to implement a principal wage earner test on its own. Thus, as these cases teach, "in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history ...", Townsend v. Swank, 404 U.S. 282, 286 (1971), state regulations which exclude people eligible for AFDC under the federal standards violate the Social Security Act.

** On at least one other occasion where this Court has held unconstitutional an eligibility restriction for government benefits, the effect of extending benefits to the excluded class was to revert to the structure of the statute prior to the addition of the unconstitutional restriction. See, Moreno v. United States Dept. of Agriculture, 345 F. Supp. 310, 315-16 (D.D.C. 1972), aff'd, 413 U.S. 528 (1973).

structure of the program.* Second, the state's suggestion that the extension ordered by the District Court would eliminate the requirement of unemployment without a principal wage earner test is simply wrong. See Appellant Sharp's J.S. at 16, but see n. 6. At any time for a family to be eligible there must be a parent who can satisfy all the requirements for being unemployed, including the prior work history test. See n.**, p. 7, supra.

The state's main reliance is not upon the statute or the legislative history, however, but on policy arguments in support of its position that Congress intended a principal wage earner test when it amended §407 in 1968. In effect, it suggests that a principal wage earner test is so clearly correct that Congress must have intended such a test in 1968 even though it did not say so. Appellees submit, however, that the policy choices involved in a principal wage earner test are difficult ones, that Congress did not consider them, and that resolution of these issues is appropriately left to Congress. See Philbrook v. Glodgett, 421 U.S. 707, 719 (1975).

For example, the principal wage earner issue forces a decision as to which among equally needy families are to be granted aid. Thus, a principal wage earner test could mean that a family with an unemployed secondary wage earner but an employed principal wage earner earning X dollars would be denied aid while another family of the same size with an unemployed principal wage earner and an employed secondary wage earner also earning X dollars would be eligible.

Another difficult policy issue raised by the state is whether AFDC-U benefits should continue when and if the second parent succeeds in finding employment. The state claims that the expanded eligibility resulting from the District Court's order coupled with

* In unusual cases both parents might be incapacitated or both might be unemployed. In such cases, if the qualifying parent ceases to be incapacitated or unemployed, the other parent's incapacity or unemployment could qualify the family.

the earned income disregard provisions of §402(a)(8) of the Act, 42 U.S.C. §602(a)(8) would make more families eligible for a longer period of time than the state considers desirable. (Appellant Sharp's J.S. at 15-19).^{*} However, the state's concern in this regard appears to stem more from the effect of the separate and important Congressional policy of disregarding part of a recipient's earnings, 42 U.S.C. §602(a)(8), than from the effect of the April 20, 1978 order. The earned income disregard of §402(a)(8) reflects Congress' judgment of the importance of providing a financial incentive for recipients to seek and retain employment. See Mr. X v. McCorkle, 333 F. Supp. 1109 (D.N.J. 1970), aff'd as modified sub. nom. Amos v. Engleman, 404 U.S. 23 (1971).^{**}

On the other hand, a principal wage earner test would clearly hurt needy families whom many would argue as a matter of policy should not be hurt. This is evident from the situation of the appellees Cindy and William Westcott. Thus, the state has notified the Westcotts that they will be terminated from AFDC-U even though they are still needy under the financial eligibility standards, because Mr. Westcott has recently found full-time employment.^{***} It has proposed to take this action because the District Court's April 20, 1978 order has been stayed with respect to families with mothers meeting the federal test of unemployment and fathers employed over 100 hours a month. The state proposed to take this action even though it appeared that the Westcotts would actually be financially worse off because Mr. Westcott had found his first steady

^{*} While expansion of the AFDC-U program in line with the District Court's April 20, 1978 order will undoubtedly entail some additional state expenditures, appellees have previously questioned the accuracy of the cost figures presented by the state. Appellant Sharp's J.S. at 18.

^{**} The issue of the earned income disregard continues to be one that Congress struggles with. In the last session of Congress, there were various proposals to change the disregard (e.g. H.R. 7200 95th Cong., 1st Sess.), §524 as reported by the Senate Finance Committee, S. Rept. No. 95-573, 95th Cong., 1st Sess. (1977)), but none have become law.

^{***} The Westcotts have previously been receiving benefits based on Cindy Westcott's unemployment. The threatened termination has not yet occurred, and an administrative hearing is pending.

employment and lost AFDC-U eligibility than if he had not found the job and the family continued to be totally dependent on the AFDC-U grant.^{*} The Westcotts' situation illustrates the implications of a principal wage earner test for needy families and the difficult nature of the policy choices involved.

Under the District Court's April 20th order, no family would receive benefits unless, and then only for as long as, they were needy under the state's financial eligibility standards. The District Court simply extended benefits to the class, doing all that was necessary to repair the constitutional violation in a manner consistent with the existing statute. Clearly the balancing of the interests of needy families such as the Westcotts and the state's interests in limiting eligibility under the federal-state AFDC-U program is one properly left to Congress. It is thus up to Congress to redesign the AFDC-U program in light of the April 20, 1978 order if it so desires.^{**}

In sum, this Court should affirm the District Court's decision barring Massachusetts from imposing a principal wage earner limit on eligibility for AFDC-U.

^{*} This information was presented to the District Court in Plaintiffs' Notice Of Massachusetts Planned Action To Terminate The Westcotts' AFDC-U and Medicaid Because of Mr. Westcott's Employment and HEW's Reaction to the State's Principal Wage Earner Test (July 28, 1978).

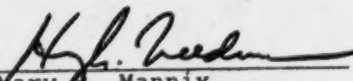
^{**} Not only is it impossible to discern Congress' intent in 1967 with respect to the principal wage earner issue, it is also impossible to predict how, if at all, Congress would react to a decision of this Court affirming the orders below. Thus, after this Court's decision in Califano v. Goldfarb, supra, which in effect extended to widowers the survivors' benefits available to widows without a proof of dependency requirement, one might have thought that Congress would subsequently have applied a dependency test to all claimants. Instead, Congress responded by providing in section 334 of Pub. L. No. 95-216, 91 Stat. 1544 that social security retirement and survivors benefits payable to spouses and surviving spouses respectively be reduced by the amount of any public retirement benefit paid to the spouse. Congress specifically declined to apply a dependency test to all claimants since it considered that such a test would be subject to manipulation. See S. Rept. No. 95-572, 95th Cong., 1st Sess. (1977) at 27-28.

CONCLUSION

For the reasons stated above, appellees respectfully request that the District Court's April 20, 1978 and August 9, 1978 orders be affirmed.

November 14, 1978

Respectfully submitted,


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July 11, 1978

Mr. Stephen Kane
Assistant Commissioner for Assistance Payments
Department of Public Welfare
600 Washington Street
Boston, Massachusetts 02111

Dear Mr. Kane:

This is in reply to your letter of June 14, 1978, with which you sent us, for review, a copy of a draft State Letter you proposed to issue to the field on the subject of the unemployed parent. This has been necessitated by the Westcott v. Califano and Sharp case. You requested our comments to assure correctness and acceptance of your revised State Plan.

Since the Court's Order of May 31, 1978 allowed your motion to stay extension of AFDC and Medicaid benefits to unemployed mothers until August 1, 1978, you have until that date to come into full compliance with the Court's Order of April 20, 1978. The May 31st Order also requires you to identify and keep records of all members of the plaintiff class who applied for AFDC-U or Medicaid after April 21, 1978, in order to be able to determine their eligibility for benefits and to pay such benefits as soon as the stay has expired.

The Court's Order of May 31, 1978 pointed out that the April 20th Order does not authorize the imposition of additional limitations on the awarding of AFDC-U or Medicaid benefits, including the primary wage earner limitation which you propose. While your motion of May 10, 1978 to clarify or amend the Court's Order has not been acted upon, our Regional Attorney believes that it is unlikely that the court will permit the adoption of a primary wage earner standard. Unless and until the court does so, we cannot assume that a primary wage earner standard is permissible.

Aside from the court action, our Regional Attorney doubts that HEW could approve a primary wage earner standard of eligibility for AFDC-U benefits under the current statute (which has become sex-neutral as a result of litigation). This is based on the fact that while Congress,

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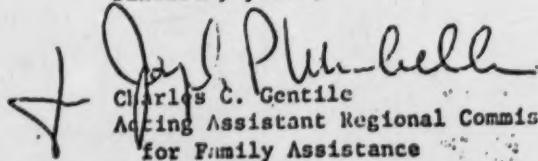
in enacting Section 407 of the Social Security Act, may have had in mind the idea of the breadwinner, in actual practice benefits under Section 407 have been provided to all unemployed fathers who meet the statutory and regulatory requirements, regardless of whether the father was actually the principal wage earner or not. Therefore, it is doubtful that, without specific legislation, HEW can take the position that the unemployed parent who is not the primary wage earner is ineligible for benefits. Our Regional Attorney is of the opinion that under the Court's two Orders, AFDC-U benefits must be extended to families in which the mother is unemployed on the same basis as they are granted to families with unemployed fathers.

Our Regional Attorney also points out that the Supreme Court in Batterton v. Francis, 97 S. Ct. 2399 (1977), emphasized that Congress expressly delegated to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC-UF eligibility. The Secretary's regulations nowhere give states discretion to define unemployment in terms of a principal wage earner, nor more specifically in terms (as your proposed Section 303.01 provides) of the parent whose "earned income or unemployment compensation was greater during the six calendar months preceding the month of application, reapplication or redetermination of eligibility".

Section 303.04(D) of your proposed draft would appear to require WIN registration by the unemployed parent without exceptions. This is contrary to Section 507 of P.L. 94-566 which provides that the exemptions contained in Section 402(a)(19)(A) are applicable to unemployed fathers/parents who apply for benefits under Section 407. Thus, an unemployed father may be exempt from WIN registration as a relative caring for a child under six years of age under Section 402(a)(19)(A)(v). With regard to Section 402(a)(19)(A)(vi), in so far as this exemption is sex discriminatory and has not been available to individuals receiving benefits under Section 407, our Regional Attorney believes HEW's position should be that this exemption is not now available to unemployed mothers seeking benefits under Section 407. In the Westcott case, plaintiff's attorney indicated that the same exemptions should be available to unemployed mothers as are now available to unemployed fathers. Therefore, with regard to WIN registration for unemployed mothers, our Central Office will have to resolve the problem before we can advise you about the acceptance of your proposed Section 303.04(D).

We hope this letter is helpful. We shall advise further as soon as we hear from our Central Office.

Sincerely yours,


Charles C. Gentile
Acting Assistant Regional Commissioner
for Family Assistance